


# Administrative Office of the Courts

Chief Justice Christine M. Durham  
Utah Supreme Court  
Chair, Utah Judicial Council

## MEMORANDUM

Daniel J. Becker  
State Court Administrator  
Myron K. March  
Deputy Court Administrator

**To:** Heather Mackenzie-Campbell, Audit Dept.  
**From:**  Brent Johnson, General Counsel  
**Re:** Ordinances Reducing the Severity of State Offenses  
**Date:** November 21, 2005

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This memorandum is in response to your e-mail dated September 21, 2005 posing two questions. The questions are: 1) can a municipality/county adopt a local ordinance to reduce the severity of state traffic code violations from misdemeanors to infractions; and 2) can a court, on its own initiative, file misdemeanor citations as infractions without a municipal/county ordinance or information filed for such a reduction? I don't think we are in a position to offer any type of binding opinion on the first question. I personally doubt that a political subdivision has authority to reduce the severity of state traffic code violations. However, the statute is not completely clear on this issue, and it is something that might have to be tested. On the second question, it is my opinion that a court cannot, on its own initiative, reduce the severity of an offense.

The Legislature has the authority to establish and define crimes, and to declare the punishment for those crimes. See e.g. State v. Codianna, 573 P.2d 343, 353 (Utah 1977) (concur by Crockett) ("the defining of what acts shall constitute crimes and the punishment therefore has always been regarded as a function of the legislative branch of government.") The Legislature can delegate some of this authority to local legislative bodies, but the local legislative body's authority depends wholly upon the authority that has been delegated. The local legislative bodies do not have any independent authority to establish crimes or set punishments.

The Legislature has delegated to local authorities the ability to regulate certain conduct by ordinance. Utah Code Ann. § 10-3-702 and § 17-53-233. The Legislature has also granted authority to establish punishments for those ordinances. § 10-3-703 and § 17-53-233. The Legislature has also stated that local legislative bodies may enact ordinances consistent with the motor vehicle code. However, Utah Code Ann. § 41-6a-207 states that "a local highway authority may not enact or enforce any rule or ordinance in conflict with the provisions of this chapter." However, arguably, this means that a local municipality or county may adopt the

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provisions of the motor vehicle code, including the degree of offense and related punishing. Arguably, local authorities may not deviate from the Legislature's determinations in the motor vehicle code. For example, a municipality could not adopt harsher penalties than that established by the Legislature. It is therefore also a strong argument that a municipality could not determine to punish its citizens less harshly than the Legislature has established. It could be argued that the general power to punish in § 10-3-703 and § 17-53-233 authorizes reductions. However, the motor vehicle code is a more specific directive. If the Legislature had granted authority to reduce motor vehicle violations, the declaration should have been more specific. It is very doubtful that local authorities can establish different punishments. However, as previously noted, this may not be an issue for us to decide.

In resolving these two questions, in addition to the applicability of core legislative functions, there are also issues concerning core executive functions and core judicial functions. A core function of the executive branch, through its prosecutors, is the discretion about whether individuals should be prosecuted. Prosecutorial discretion allows prosecutors to decide whether someone is charged, and with what offenses they will be charged.

Based on the case of West Valley City v. McDonald, 948 P.2d 371 (Utah App. 1997), prosecutors have asserted the right to charge an established offense at a lesser degree than that which is stated in statute or ordinance. This practice has been used to avoid jury trials. By amending misdemeanors down to infractions, a defendant loses the statutory right to a jury trial. I reread McDonald, and I am not convinced that this case adequately addressed a prosecutor's authority to reduce the charge that is stated in an ordinance or statute. The issues in that case were whether the reduction of the charge violated the Utah Rules of Criminal Procedure or the United States Constitution. The Court of Appeals determined that the reduction did not violate the rules or the U.S. Constitution. However, the case did not address whether the practice violates the Utah Constitution. The issue was not adequately briefed and therefore has not been addressed. I believe that there is a very significant and strong argument that prosecutorial discretion does not include the ability to usurp the legislative function of determining what constitutes a crime and what the punishment should be. I don't think prosecutors should be able to reduce charges to avoid jury trials. I believe that the practice violates the Utah Constitution. Nevertheless, that is also probably not an issue for us to address.

The main issue in which we have an interest is whether a court, on its own motion, may reduce the severity of an offense. As the above discussion notes, the severity of an offense is probably a legislative function. It can also be argued that the decision about what to charge involves prosecutorial discretion and is therefore an executive function. In any event, whether it is primarily a legislative function, or partly an executive function, it is not a judicial function. The severity of an offense is determined by other branches of government and therefore the court may not file misdemeanor violations as infractions.

Please let me know if you have any questions about this.